No. 83-1393

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In the Supreme Court of the United States

OCTOBER TERM, 1983

UNITED STATES OF AMERICA, PETITIONER

v.

LARRY WAYNE CASSITY, BILLY SWORD AND STEPHEN GORDON LENK

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether the warrantless monitoring of signals from a beeper installed inside containers of chemicals and equipment that law enforcement authorities reasonably believe will be used to manufacture illegal drugs violates the Fourth Amendment when the monitoring occurs while the beeper is located within a home.

2. If so, whether a warrant authorizing beeper surveillance is invalid under the Fourth Amendment because it does not contain a termination date.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

The Solicitor General, on behalf of the United States, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals after remand (App., *infra*, 1a-14a) is reported at 720 F.2d 451. The opinion of the court of appeals before remand (App., *infra*, 15a-24a) is reported at 631 F.2d 461. The opinion of the district court on remand (App., *infra*, 25a-46a) is reported at 546 F. Supp. 611. The district court's oral pre-trial ruling on respondent Cassity's suppression motion (App., *infra*, 48a) is not reported.

JURISDICTION

The judgment of the court of appeals (App., *infra*, 49a) was entered on October 31, 1983. The government's motion to hold the case in abeyance pending

this Court's disposition of *United States* v. *Karo*, cert. granted, No. 83-850 (Jan. 16, 1984), was denied on December 23, 1983 (App., *infra*, 50a). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).[1]

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[1] Under Rule 20.4 of the Rules of this Court, the time for filing a petition for a writ of certiorari runs from the date of the judgment sought to be reviewed except where a timely petition for rehearing has been filed, in which case the time for filing the petition for certiorari runs from the date of the denial of rehearing. See *United States* v. *Healy*, 376 U.S. 75, 77-80 (1964); *Department of Banking* v. *Pink*, 317 U.S. 264, 266 (1942). Although styled a "motion," the government's request that the court of appeals hold the case in abeyance pending this Court's disposition of *United States* v. *Karo*, *supra*, was in substance a petition for rehearing, seeking reconsideration of the court of appeals' decision following this Court's decision in *Karo*. See *Hines* v. *Royal Indemnity Co.*, 253 F.2d 111, 112-114 (6th Cir. 1958) (motion "to set aside and vacate the final judgment in favor of appellee," which "attack[ed] the correctness of the judgment as a matter of law," was "obviously a petition for rehearing under a different name"). See also Fed. R. App. P. 40(a) ("The petition shall state with particularity the points of law or fact which in the opinion of the petitioner the court has overlooked or misapprehended".); *Department of Banking* v. *Pink*, 317 U.S. at 266 ("a motion for reargument or rehearing * * * seek[s] to have the Court of Appeals reconsider * * * question[s] decided in the case"); *NLRB* v. *Brown & Root, Inc.*, 206 F.2d 73, 74 (8th Cir. 1953) ("The purpose of a petition for rehearing * * * is to direct the court's attention to some material matter of law or fact which it has overlooked in deciding a case, and which, had it been given consideration, would probably have brought about a different result".). When we have sought or this Court has granted review of an issue also decided in a particular case by the court of appeals, it is our customary practice to ask the court of appeals to hold its case pending this Court's resolution of the issue, and thereafter to rehear it if appropriate in light of that resolution, in an effort to avoid burdening this Court with a protective petition for certiorari. The government's motion in this case seeking reconsideration was filed in the court of appeals within the time for filing a petition for rehearing. Thus, even though the court of appeals refused to treat the government's motion to hold the case in abeyance as a petition for rehearing (App., *infra*, 51a), we submit that this

CONSTITUTIONAL PROVISION INVOLVED

The Fourth Amendment provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

STATEMENT

Following a jury trial in the United States District Court for the Eastern District of Michigan, respondents and co-defendants Terry Gene Hines and Raymond Lee Dean were convicted of manufacturing amphetamine, in violation of 21 U.S.C. 841(a)(1), and conspiracy to commit that offense, in violation of 21 U.S.C. 846.[2] Respondent Cassity was sentenced to three years' imprisonment, to be followed by a two-year special parole term.

Court should treat the motion as a petition for rehearing for purposes of considering the timeliness of this petition.

Even were it concluded that the government's motion in the court of appeals did not technically qualify as a petition for rehearing, we respectfully submit that the Court should waive the time limit specified in Rule 20.1 of this Court's Rules and consider the petition on the merits. We note that the time limit prescribed in Rule 20.1 is not jurisdictional in criminal cases. See Stern & Gressman, *Supreme Court Practice* 392-393 (5th ed. 1978) (collecting cases). The delay in filing the instant petition can cause no prejudice to respondents (since the instant petition would indisputably be timely had the proper label been attached to the government's filing in the court of appeals) and, given the similarity of the principal issue to that presented in *Karo*, will not result in delay in acting on the petition should the Court, as is its customary practice, hold this case pending its decision in *Karo*.

[2] The court of appeals affirmed co-defendant Hines' conviction (App., *infra*, 2a n.1). The government dismissed the charges as to Dean, who is serving a life sentence on a state conviction.

Respondents Lenk and Sword were each sentenced to two years' imprisonment, to be followed by a two-year special parole term. The court of appeals reversed respondents' convictions and remanded the case for a new trial, holding that evidence obtained as a result of beeper surveillance should not have been admitted against respondents at trial (App., *infra*, 1a-14a).

1. The evidence showed that, from April to August 1977, Special Agent John Graetz of the Drug Enforcement Administration posed as a supplier of precursor chemicals and laboratory equipment to Jay Cody, who was alleged to be the head of respondents' drug manufacturing ring (App., *infra*, 2a).[3] Agent Graetz installed beepers inside two cans of chemicals and one piece of equipment that he delivered to Cody in July 1977. The beepers were installed pursuant to search warrants issued by a United States magistrate, but none of the warrants contained a provision limiting the period of surveillance. *Id.* at 3a.

Agent Graetz delivered to Cody a container of chemicals containing a beeper on July 11, 1977. By monitoring the beeper's signals, DEA agents traced the chemicals to respondent Cassity's home and then to respondent Sword's home. On July 28, Agent Graetz delivered the other two beeper-laden items, which also were traced to Sword's home. On August 11, 1977, the agents ascertained that the beepers had been moved to co-defendant Dean's home. App. *infra*, 3a.

The agents continued monitoring the beeper's signals until August 17, 1977, when they executed a search warrant at Dean's residence. At various times during the period of surveillance, the agents observed respondents and the other co-conspirators enter and leave

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[3] Although Cody was charged in the indictment, he became a fugitive and was not tried together with respondents (App., *infra*, 4a). Cody was subsequently apprehended and pleaded guilty to the conspiracy charge.

Dean's house. On three occasions during this period, Cody delivered samples of amphetamine to Agent Graetz. App., *infra*, 3a.

In the course of executing the warrant at Dean's home, the agents seized a complete laboratory capable of producing amphetamine. Although the fingerprints of respondents Lenk and Sword and co-defendants Dean and Hines were discovered on the equipment, no trace of amphetamine could be found. App., *infra*, 3a.

Prior to trial, respondent Cassity moved to suppress the fruits of the beeper surveillance. He contended that the Fourth Amendment requires the govenment to obtain a warrant in order to install and monitor beepers, and that the beeper warrants in this case were constitutionally deficient because of the absence of a time limitation. The district court denied the motion, holding that the use of a beeper does not require a warrant because a beeper is merely a substitute for visual surveillance. App., *infra*, 48a.

The court of appeals vacated respondents' convictions and remanded for further proceedings on the suppression issue (App., *infra*, 15a-24a). Relying on its decision in *United States* v. *Bailey*, 628 F.2d 938 (6th Cir. 1980), the court concluded that a beeper warrant containing no time limit does not meet Fourth Amendment requirements, and that suppression of the fruits of the beeper monitoring would be required with respect to a defendant whose legitimate expectations of privacy had been invaded by the monitoring (App., *infra*, 20a-21a). Because Cassity had filed a timely suppression motion, the court concluded that he was entitled to a remand to demonstrate that his legitimate privacy expectations had been violated by the monitoring of the beeper while it was inside his home (*id.* at 21a). The court also concluded that a remand for further consideration of the suppression issue was appropriate with respect to the remaining defendants, including respondents, even

though they had not moved to suppress the fruits of the beeper surveillance (*id.* at 21a-23a).[4]

Following a hearing on remand, the district court denied the motions to suppress (App., *infra*, 25a-47a). Applying *Bailey*, the court concluded that the legitimate privacy expectations of respondents had been invaded by the beeper monitoring (*id.* at 27a-38a). The court held, however, that the fruits of the monitoring should not be suppressed because the rule announced by the court of appeals in *Bailey* should not be applied retroactively (App., *infra*, 39a-46a).

The court of appeals again reversed (App., *infra*, 1a-14a). It reaffirmed its holding in *Bailey* that "'beeper surveillance of non-contraband personal property in private areas trenches upon legitimate expectations of privacy and constitutes a search or seizure within the meaning of the fourth amendment'" (App., *infra*, 7a (quoting *Bailey*, 628 F.2d at 944)). The court expressed the view that nothing in this Court's decision in *United States* v. *Knotts*, No. 81-1802 (Mar. 2, 1983), undercuts that principle insofar "as it applies to monitoring beepers located in areas in which the subject of the search exhibits a legitimate expectation of privacy" (App., *infra*, 7a, citing, inter alia, *United States* v. *Karo*, 710 F.2d 1433 (10th Cir. 1983), cert. granted, No. 83-850 (Jan. 16, 1984)). The court of appeals held that the district court erred in considering the retroactivity of *Bailey*, which, it concluded, was an is-

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[4] In so concluding, the court of appeals expressed the view that in the circumstances of this case, the interests of finality underlying the rule that suppression claims are deemed waived unless raised prior to trial (Fed. R. Crim. P. 12(b)(3) and (f)) would not be jeopardized by appellate review of the remaining defendants' claims (App., *infra*, 23a). Although we disagree with the court's determination on the Rule 12 waiver issue, we do not seek review of that determination here.

sue beyond the scope of the remand order (App., *infra*, 12a-13a).

REASONS FOR GRANTING THE PETITION

The decision of the court of appeals in this case raises an important question of Fourth Amendment law identical to one of the questions now before the Court in *United States* v. *Karo*, cert. granted, No. 83-850 (Jan. 16, 1984). That question is whether the warrantless monitoring of a beeper violates the Fourth Amendment when the monitoring occurs while the beeper is located within a home or other private area. Both here and in *Karo*, federal law enforcement agents investigating an illegal drug manufacturing ring monitored signals from a beeper while the beeper was located inside private premises. In both cases, the beeper surveillance had been authorized by warrants that the courts subsequently determined were invalid. Similarly, the courts of appeals in both cases held that the deficiencies in the warrants could not be disregarded because, in the courts' view, the Fourth Amendment is violated by warrantless beeper surveillance if it happens during the course of the surveillance that the suspects take the beeper-laden container into a home or other private premises. Indeed, in its decision here, the court of appeals expressly relied on the decision of the Tenth Circuit in *Karo* (App., *infra*, 7a).[5]

The Court should hold this petition pending its decision in *Karo*.[6] If the Court concludes in *Karo* that a warrant is not required to monitor a beeper even if the beeper is taken inside private premises, it should grant

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[5] By the same token, the Tenth Circuit in *Karo* relied on the decision of the Sixth Circuit in *United States* v. *Bailey*, *supra*, in reaching that same result. *United States* v. *Karo*, 710 F.2d at 1439-1440.

[6] We are sending copies of our petiton in *Karo* to counsel for respondents.

certiorari in this case and either reverse the judgment of the court of appeals or remand for reconsideration in light of the decision in *Karo*.

2. On the other hand, if the Court in *Karo* holds that beeper surveillance must be authorized by a warrant, the Court should grant the instant petition to decide whether a beeper warrant that contains no termination date is invalid under the Fourth Amendment.

In *United States* v. *Bailey*, 628 F.2d at 945, the court of appeals held that "a warrant which places no time limit on the search or seizure it purports to authorize is invalid."[7] The court reasoned that the Fourth Amendment requires a showing "of *present* probable cause" (628 F.2d at 945 (emphasis in original)), and suggested that the information supporting the issuance of a beeper warrant might become stale over time. In addition, the court expressed the view that "[u]nless the warrant contains a time limit, it cannot assure the reasonableness of the search it purports to authorize" and is therefore invalid under the Fourth Amendment (628 F.2d at 945).

The concerns expressed by the court of appeals in *Bailey*, on which the court below relied in invalidating the warrants in the instant case (App., *infra*, 20a), overlook the significant differences between beeper surveillance and traditional searches and seizures. The information disclosed by a beeper is extremely limited in scope (a beeper discloses only its own location), and does not change over time.[8] Moreover, given the limit-

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[7] The court based this holding on a portion of this Court's decision in *Berger* v. *New York*, 388 U.S. 41, 59-60 (1967), and on its prior decision in *United States* v. *Lamonge*, 453 F.2d 197 (6th Cir.), cert. denied, 409 U.S. 863 (1972).

[8] Of course the location in which the chemicals are stored may, and typically does, change over time as the conspirators employ counter-surveillance methods, but the beeper still discloses only the single piece of information as to its location. In

ed nature of the information transmitted by a beeper, together with the facts that drug manufacturers characteristically hold on to the chemicals for a considerable but unpredictable length of time before commencing their illicit manufacturing operations and that a further warrant—based on a showing of current probable cause—must ordinarily be procured before the agents may search the premises to which the beeper has been traced, a time limitation in the warrant serves no function other than to multiply red tape.

CONCLUSION

The court should defer consideration of the petition for a writ of certiorari pending its decision in *United States* v. *Karo*, and should then dispose of the petition as appropriate in light of that decision.

Respectfully submitted.

REX E. LEE
Solicitor General

FEBRUARY 1984

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contrast to a conventional search for contraband or other evidence at a location that can be identified to the magistrate in advance, as to which the concept of staleness has obvious relevance, the sole purpose of beeper monitoring is to keep track of the location of the container, a matter as to which staleness concepts have little utility.

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Nos. 81-1565, 81-1566, 81-1567

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE,

v.

LARRY WAYNE CASSITY, (81-1565)
BILLY SWORD, (81-1566)
STEPHEN GORDON LENK, (81-1567)
DEFENDANTS-APPELLANTS.

On Appeal from the United States District Court for the Eastern District of Michigan

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Decided and Filed October 31, 1983

Before: MARTIN and JONES, Circuit Judges; and BROWN, Senior Circuit Judge.

BOYCE F. MARTIN, JR., Circuit Judge. This case, before us for the second time, raises important fourth amendment issues. When first confronted with this case, this court was asked to consider, *inter alia*, whether the monitoring of an electronic homing transmitter (beeper) could ever amount to a search and seizure in fourth amendment terms. Citing *United States* v. *Bailey*, 628 F.2d 943 (6th Cir. 1980), a decision reached in the interim between trial and appeal of this case, we answered affirmatively. *United States* v. *Cassity, et al.* (*Cassity I*), 631 F.2d 461 (1980). Simultaneously we considered and answered the question of the validity of the warrants obtained by the police prior

to the installation and monitoring of the beeper transmitters. We held the warrants invalid due to lack of time limits. However, finding ourselves without the benefit of an evidentiary record on the issue of the individual defendants' expectations of privacy and therefore unable to determine whether the challenged warrantless monitoring impinged upon the defendant's constitutional rights, we remanded the case to the lower court for further fact-finding.

On remand, the district court, after hearing evidence on the defendants' expectations of privacy, determined that three[1] of the four had been the victims of unconstitutional searches. It declined to suppress evidence gleaned as a result of these searches, however, holding that the rule announced in *Bailey* should not be given retroactive effect. Accordingly, it affirmed the convictions. That decision is before us on appeal. We now reverse that decision.

I.

The facts are succinctly summarized in *Cassity I*.

> These cases arose from the undercover investigative efforts of Special Agent John Graetz of the Drug Enforcement Administration (DEA). From April to August 1977, Agent Graetz posed as a supplier of precursor chemicals and laboratory glassware to Jay Cody, who is alleged to be the central figure in the conspiracy. Cody apparently coordinated the conspirators' operations, arranged to obtain necessary chemicals and equipment and delivered samples of amphetamine manufactured in the conspirators' clandestine laboratory.

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[1] The fourth defendant, Hines, claimed that monitoring a beeper secreted in a can of chemicals traveling in the back of a van driven by him on a public highway amounted to an unconstitutional search. The district court disagreed, finding that he lacked an expectation of privacy in the contents of the van. By order date October 4, 1983, we have affirmed Hines' conviction.

Among the chemicals and equipment Agent Graetz delivered to Cody at various times were secreted three electronic homing devices, or beepers. Two were located in cans of precursor chemicals and one was hidden in a heating mantle. All three beepers were installed pursuant to search warrants issued by a United States Magistrate. However, none of the warrants contained a time limit.

Agent Graetz delivered the first beeper on July 11, 1977. By monitoring the beeper's signals, DEA agents traced the chemicals to defendant Cassity's home at 2803 Stair Street in Detroit. On July 15, the beeper's signals indicated the chemicals had been moved to defendant Sword's home at 1494 Calvary in Detroit. On July 28, Agent Graetz delivered the other two beepers, which also were monitored to Sword's home. On August 11, 1977, all three beepers were located in the basement of defendant Dean's home at 6344 Hanson in Detroit.

DEA agents monitored the beepers' signals until August 17. They observed all five defendants and Cody enter and leave the house at 6344 Hanson at various times during the monitoring. On three occasions during the beeper surveillance, Cody delivered samples of amphetamine allegedly produced by the conspirators.

On August 17, 1977, DEA agents executed a search warrant at 6344 Hanson. In the basement, they found a complete laboratory which expert testimony established was capable of producing amphetamine. The agents did not, however, find any trace of amphetamine on the premises. Investigation revealed that a number of chemical containers and pieces of laboratory equipment bore the fingerprints of defendants Lenk, Sword, Dean and Hines.

The defendants were indicted, along with Cody, for conspiring to manufacture and manufacturing amphetamine in violation of 21 U.S.C. §§ 841(a)(1) and 846. The indictment also charged Cody with

ten counts of possessing and distributing amphetamine. However, Cody remained a fugitive and was not tried with the appellants.

The case went to trial on July 18, 1978. The Government's case against the appellants consisted primarily of testimony that all the appellants had been observed in and around the laboratory's location (Dean's home) the day of the search; that Cassity and Sword previously had stored precursor chemicals and laboratory equipment in their homes; that Hines had picked up chemicals and glassware left in a rented van by Agent Graetz; that Lenk was in the laboratory at the time of the search; and that fingerprints of four of the appellants were found on glassware in the laboratory. In addition, the Government introduced tape recordings of Cody's numerous telephone conversations with Agent Graetz, as well as the samples of amphetamine Cody had delivered to Graetz.

The jury convicted all five appellants of conspiracy and manufacturing amphetamine.

631 F.2d at 462-63.

Several issues are presented here. Defendants argue that the district court exceeded its mandate on remand when it considered the question of the retroactive application of the *Bailey* decision to the facts of this case. Moreover, they argue that the manner in which the court resolved the question was erroneous. The government disagrees and, additionally, asserts that the lower court erroneously concluded that defendants Sword, Lenk, and Cassity had successfully proven legitimate expectations of privacy in those areas subject to beeper monitoring.

Shortly before oral argument in this case, the Supreme Court delivered on opinion in *United States* v. *Knotts*, ___ U.S. ___, 75 L.Ed.2d 55 (1983). Because *Knotts* concerned warrantless beeper monitoring, we asked the parties to brief the decision. We have received those briefs, considered the question, and now

hold, as a preliminary matter, that *Knotts* does not affect our decisions in either *Bailey* or *Cassity I* or control our resolution of the issues here.

In *Knotts*, the police utilized electronic beeper surveillance to track the movement of chemicals in an automobile on an open highway and, when highway surveillance was interrupted, to locate the chemicals under a barrel outside a cabin on private property. The Court, reversing the court of appeals, held that the monitoring did not invade any legitimate expectation of privacy on the defendant's parts and, therefore, that there was neither a search nor a seizure in fourth amendment terms.

Although the opinion contains some sweeping language suggesting a broad expansion of search and seizure law, read as a whole *Knotts* does little more than apply established doctrine to an unconventional type of search. The majority relies on the "automobile exception" to the fourth amendment, *see Cardwell* v. *Lewis*, 417 U.S. 583 (1974), and the open fields doctrine, *see Hester* v. *United States*, 265 U.S. 57 (1924), to validate the electronic tracking. Common to both concepts is the notion of diminished expectation of privacy in those things otherwise open to public inspection. The beeper, said the Court, revealed nothing more to the police than constitutionally permissible visual surveillance could have revealed.

> Visual surveillance from public places along Petschen's route or adjoining Knotts' premises would have sufficed to reveal all of these facts to the police. The fact that the officers in this case relied not only on visual surveillance, but on the use of the beeper to signal the presence of Petschen's automobile to the police receiver, does not alter the situation. Nothing in the Fourth Amendment prohibited the police from *augmenting the sensory faculties* bestowed upon them

at birth with such enhancement as science and technology afforded them in this case.

75 L.Ed.2d at 63.

The use to which the police may put a beeper without first obtaining a warrant is "limited", however. *Id.* at 64. Nothing in the Court's opinion abrogates the sanctity of a private home or dwelling place. Although "no ... expectation of privacy extended to the visual observation of [the defendants'] automobile arriving on his premises after leaving a public highway, nor to movements of objects such as the drum of chloroform outside the cabin in the 'open fields'", *id.* at 62, the defendant "undoubtedly had the traditional expectation of privacy within a dwelling place insofar as the cabin was concerned." *Id.*

> *As we have noted, nothing in this record indicates that the beeper signal was received or relied upon after it had indicated that the drum containing the chloroform had ended its automobile journey at rest on respondent's premises in rural Wisconsin.* Admittedly, because of the failure of the visual surveillance, the beeper enabled the law enforcement officials in this case to ascertain the ultimate resting place of the chloroform when they would not have been able to do so had they relied solely on their naked eyes. But scientific enhancement of this sort raises no constitutional issues which visual surveillance would not also raise. A police car following Petschen at a distance throughout his journey could have observed him leaving the public highway and arriving at the cabin owned by respondent, with the drum of chloroform still in the car. This fact, along with others, was used by the government in obtaining a search warrant which led to the discovery of the clandestine drug laboratory. *But there is no indication that the beeper was used in any way to reveal information as to the movement of the drum within the cabin, or in any way that would not have been visible to*

> *the naked eye from outside the cabin.* Just as notions of physical trespass based on the law of real property were not dispositive in *Katz*, *supra*, neither were they dispositive in *Hester* v. *United States*, 265 U.S. 57 (1924).

Id. at 64 (emphasis added).

In *Bailey*, we said "beeper surveillance of non-contraband personal property in private areas trenches upon legitimate expectations of privacy and constitutes a search or seizure within the meaning of the fourth amendment." 628 F.2d at 944. Nothing in *Knotts* erodes that principal as it applies to monitoring beepers located in areas in which the subject of the search exhibits a legitimate expectation of privacy. *See Katz* v. *United States*, 389 U.S. 347 (1967); *Bailey*, 628 F.2d at 940; *United States* v. *Karo*, ____ F.2d ____, 52 U.S.L.W. 2106 (10th Cir. August 23, 1983). We come back, then, to the question we posed on remand—namely, whether defendants Lenk, Sword, or Cassity, had exhibited a legitimate expectation of privacy in those places into which they carried the chemicals containing the beepers. *Cassity I*, 631 F.2d at 464-65. The district court held that they had. We agree.

Because fourth amendment rights are "personal," *Rakas* v. *Illinois*, 439 U.S. 128, 140 (1978), the central inquiry in any suppression hearing is whether the defendant challenging the admission of evidence has shown a legitimate expectation of privacy in the place searched or the thing seized. *United States* v. *Salvucci*, 448 U.S. 83 (1980). Whether a legitimate expectation of privacy exists in a particular item or place is a determination to be made on a case-by-case basis, *Brown*, 635 F.2d at 1211. That question in turn entails a two-part inquiry: (1) whether the individual defendant has exhibited an actual subjective expectation of privacy and (2) whether that expectation is one society recognizes as reasonable or legitimate. *Katz* v. *United*

States, 389 U.S. 347, 362 (1967) (Harlan, J. concurring); *Smith* v. *Maryland*, 442 U.S. 735, 740-41 (1979); *United States* v. *Brown*, 635 F.2d 1207 (6th Cir. 1980); *United States* v. *Bailey*, 628 F.2d 938, 940-41 (6th Cir. 1980).

"Legitimation of expectations of privacy by law must have a source outside of the Fourth Amendment, either by reference to concepts of real or personal property law or to understandings that are recognized and permitted by society." *Rakas*, 439 U.S. at 143 n.12. To identify which expectations merit fourth amendment protection, the courts have pointed to a number of factors. Most obvious among these is an individual's possessory or proprietary interest in the place or thing. However, a property right alone is not determinative of whether the individual reasonably expected "freedom from governmental intrusion." *Mancusi* v. *Forte*, 352 U.S. 364, 368 (1968). In *United States* v. *Haydel*, 649 F.2d 1152 (5th Cir. 1981), *rehearing denied*, 664 F.2d 84, *cert. denied*, 455 U.S. 1022 (1982), the Fifth Circuit identified other factors anyone of which or any combination of which could, in the circumstances of a specific case, signify legitimacy.

> No one circumstance is talismanic to the *Rakas* inquiry. "While property ownership is clearly a factor to be considered in determining whether an individual's Fourth Amendment rights have been violated, property rights are neither the beginning nor the end of . . . [the] inquiry." *United States* v. *Salvucci*, 448 U.S. 83, 92, 100 S.Ct. 2547, 2553, 65 L.Ed.2d 619, 628 (1980) (citation omitted). Other factors to be weighed include whether the defendant has a possessory interest in the thing seized or the place searched, whether he has the right to exclude others from that place, whether he has exhibited a subjective expectation that it would remain free from governmental invasion, whether he took normal precautions to maintain his privacy and

whether he was legitimately on the premises. *See Id.; Rawlings* v. *Kentucky*, 448 U.S. 98, 100 S.Ct. 2556; 65 L.Ed.2d 633 (1980); *Rakas* v. *Illinois*, 439 U.S. 128, 99 S.Ct. 421, 58 L.Ed.2d 387 (1978). As the very listing of these factors demonstrates, the expectation must be based on considerations outside of the fourth amendment. *Rakas* v. *Illinois*, 439 U.S. at 142-145 n.12, 99 S.Ct. at 430-31, n.12, 58 L.Ed.2d at 400-402 n.12.

Id. at 1154-55.

In *Bailey*, this court held that defendants who had stored chemicals containing a beeper transmitter in a locked storage room in the basement of an apartment complex had "exhibited an expectation of privacy in the location of the chemicals which, but for the beeper surveillance, would have been entirely justified." *Id.* at 944. *See United States* v. *Carriger*, 541 F.2d 545 (6th Cir. 1976) (tenants of apartments may have the same expectation of privacy in their apartments as homeowners in their homes). There is little difference between that situation and the situation presented by Cassity and Sword's claims here. Sword resided at 1494 Calvary Street, a three- or four-unit[2] apartment complex with his girlfriend, a child, and cotenants. The chemicals containing the beeper were kept in the locked basement to which only Sword and a friend had the key. It was not a common area accessible to public and tenants alike. *See Fixed* v. *Wainwright*, 492 F.2d 480, 484 (5th Cir. 1974). There is no evidence that his friend consented to the search. *See United States* v. *Matlock*, 415 U.S. 164 (1974); *United States* v. *Sumlin*, 567 F.2d 684, 687 (6th Cir. 1977), *cert. denied*, 435 U.S. 932 (1978). In Cassity's case, he had resided with his parents at 2803 Starr Street twenty to twenty-five years. He kept his clothes and other personal effects there. Although he did not personally own the house, for all

[2] It is unclear from the record.

intents and purposes, it was his home. We think it indisputable that Cassity had an expectation of privacy which was legitimate in the Starr Street address. *See Haydel*, 649 F.2d at 1155 (son had a legitimate expectation of privacy in gambling records kept in parents' home although he did not reside there regularly). Moreover, that expectation reasonably extended to all parts of the home, including the garage. *See United States* v. *Bauerman*, 552 F.2d 61, 64-65 (2d Cir. 1977) (lessees of a commercial building who had expectation of privacy in offices could also legitimately expect privacy in the garage).

The government argues that neither Cassity nor Sword can establish even a subjective expectation of privacy in the chemicals because neither admitted to ownership of or knowledge of the containers. This argument misconstrues the basis for finding that Cassity and Sword have "standing" to object to the government's actions in this case. Whether beeper monitoring in a private home is characterized as a search or a seizure is unimportant. *Bailey*, 628 F.2d at 940. What is important is that it entails governmental intrusion into an area when privacy can most legitimately be expected. *See United States* v. *Weeks*, 232 U.S. 383 (1941); *Bailey*, 628 F.2d at 944. It is this fact—the intrusive monitoring of objects within the sanctity of the home—which permits Cassity and Sword to successfully suppress any and all evidence garnered as a result.

Lenk was a guest in Dean's home when the police entered with a search warrant. At the time of the search, he was in the basement working in what was shown to be the laboratory used by the defendants to manufacture the illegal drugs. Seized in the search was a bag containing Lenk's personal effects, as well as papers on which were written chemical formulas. The government, relying primarily upon the Tenth Circuit's decision in *United States* v. *Clayborne*, 584 F.2d 346, 348

(1978), argues that Lenk may not object to the search because "no one, at least no non-resident, could derive rights that society should be prepared to recognize as legally justified from his work in a clandestine drug laboratory." Government brief, p. 41. The government misses the point, however. It is Lenk's status as a guest of Dean's and not his presence as a chemist in a clandestine drug laboratory which gives him a subjective expectation of privacy the police were not privileged to infringe.

In *Jones* v. *United States*, 362 U.S. 257 (1960), the Supreme Court advanced "the unremarkable proposition that a person can have a legally sufficient interest in a place other than his own home so that the Fourth Amendment protects him from unreasonable governmental intrusion into that place." Although in subsequent decisions, the Court has narrowed somewhat the sweeping provisions of *Jones*, it remains the law that one who resides at a private residence with permission of the owner as a guest or invitee may demonstrate an expectation of privacy in the premises legally sufficient to support a challenge to a police search. *See Rakas*, 439 U.S. at 141-142. Like the defendant in *Jones*, Lenk was at the Dean home with permission of the owner, came and went freely, and kept his personal belongings there. He testified that he expected privacy. These facts are sufficient to establish a legitimate, reasonable expectation of privacy protected by the Fourth Amendment.

Clayborne is easily distinguishable. The court's opinion is predicated explicitly on the commercial nature of the building, which, it said, "was susceptible not only to outside viewing, but also to ingress and egress of the public." *Id.* at 350 (footnote omitted). "Strict privacy," the court continued, "as in a home was not to be properly expected here." *Id.* In contrast, the Hanson Street location was a private home where the homeowner,

Dean, and his guest Lenk, could properly expect freedom from uninvited intrusions. The fact that part of the home was used for illegal purposes does not obviate this conclusion. As the district court stated, when the *Jones* Court held that "wrongful" presence at the scene of the search would preclude the legitimacy of the privacy expectation, "wrongful" was used to refer to the occupancy of the premises, not its use. *See Rakas*, 439 U.S. at 141 n.9. We also agree with the district court's determination that the facts that the monitoring began before Lenk arrived and that a warrant was obtained prior to the search of the house do not save the government's case. Whether or not Lenk was in the house as a guest when the illegal monitoring began is irrelevant. When he arrived, the monitoring was still in progress. Therefore what we have already found to be Lenk's legitimate expectation of privacy in the premises was infringed. In effect, he steps into the shoes of the homeowner, whose ongoing interest in the privacy of his home permits him to challenge any intrusion, regardless of whether he was present or not.

The government also argues that because it obtained a search warrant prior to entering the Hanson Street address the search and any evidence seized were legal. We disagree. The location of the Hanson Street building was ascertained through illegal beeper monitoring. Once located, additional evidence arguably sufficient to show probable cause was otherwise legally gathered through visual surveillance and other means. However, the fact remains that but for the beeper, the opportunity to gather other evidence might not have arisen. This additional evidence, therefore, is fruit of the initial illegal search. *See Wong Sun* v. *United States*, 371 U.S. 471 (1963).

Having concluded that Lenk, Sword and Cassity had shown legitimate expectations of privacy which the government's warrantless beeper monitoring had in-

fringed, the district court went on to consider and resolve in the negative the issue of whether *Bailey* should be applied retoractively to exclude the tainted evidence. To reach that issue was error. In *Cassity I*, we explicitly stated that the scope of the court's task on remand was limited to determining "whether the beeper surveillance by the Government invaded ... [the defendant's] ... legitimate expectation of privacy." To that end, the court was to hold "suppression hearings," and if it found such an invasion, to grant the suppression motion. That the court was not then to proceed to consider the retroactivity issue was equally obvious from other language in *Cassity I* making it plain that this court had already considered and resolved the issue. *Id.* at 464-465 ("Given our *Bailey* decision...; As our *Bailey* decision makes clear ... On remand the district court should undertake the analysis outlined in *Bailey*.")

To conclude, because we affirm the district court's findings that Lenk, Sword, and Cassity each had legitimate expectations of privacy in the respective locations subjected to beeper monitoring, monitoring without a warrant violated the Fourth Amendment. Evidence gleaned as a result of the monitoring should be suppressed. We vacate the lower court's decisions on the question of Bailey's retroactivity, that issue having been improperly considered. Of course, should the government elect to retry these defendant's the exclusion of evidence need not be complete for all defendants. For example, evidence seized from Hanson Street, while inadmissible against Lenk because its seizure violated a legitimate privacy interest of his, is admissible for any relevant purpose against either Sword or Cassity, neither of whom have legitimate expectations of privacy in that house. Because all the evidence was admitted in a joint trial, however, we are unable here

to selectively determine the actual effect of erroneous admission on each defendant.

APPENDIX B

UNITED STATES COURT OF APPEALS, SIXTH CIRCUIT

Nos. 78-5426 to 78-5430.

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE,

v.

LARRY WAYNE CASSITY, STEPHEN GORDON LENK, BILLY SWORD, TERRY GENE HINES AND RAYMOND LEE DEAN,

DEFENDANTS-APPELLANTS.

Argued and Submitted Dec. 13, 1979

Decided Oct. 16, 1980.

Before LIVELY and BOYCE F. MARTIN, JR., Circuit Judges, and PHILLIPS, Senior Circuit Judge.

HARRY PHILLIPS, Senior Circuit Judge.

The defendants-appellants challenged their convictions for conspiring to manufacture and manufacturing amphetamine, a controlled substance. They argue the evidence on which they were convicted is the fruit of illegal electronic surveillance. We vacate the judgments and remand the cases for hearings to determine whether the use of beepers or electronic homing devices by the Government in this case violated the individual defendants' legitimate expectations of privacy. *See United States* v. *Bailey*, 628 F.2d 938 (1980).

These cases arose from the undercover investigative efforts to Special Agent John Graetz of the Drug Enforcement Administration (DEA). From April to August 1977, Agent Graetz posed as a supplier of precursor chemicals and laboratory glassware to Jay Cody, who is alleged to be the central figure in the conspiracy.

Cody apparently coordinated the conspirator's operations, arranged to obtain necessary chemicals and equipment and delivered samples of amphetamine manufactured in the conspirators' clandestine laboratory.

Among the chemicals and equipment Agent Graetz delivered to Cody at various times were secreted three electronic homing devices, or beepers. Two were located in cans of precursor chemicals and one was hidden in a heating mantle. All three beepers were installed pursuant to search warrants issued by a United States Magistrate. However, none of the warrants contained a time limit.

Agent Graetz delivered the first beeper on July 11, 1977. By monitoring the beeper's signals, DEA agents traced the chemicals to defendant Cassity's home at 2803 Stair Street in Detroit. On July 15, the beeper's signals indicated the chemicals had been moved to defendant Sword's home at 1494 Calvary in Detroit. On July 28, Agent Graetz delivered the other two beepers, which also were monitored to Sword's home. On August 11, 1977, all three beepers were located in the basement of defendant Dean's home at 6344 Hanson in Detroit.

DEA agents monitored the beepers' signals until August 17. They observed all five defendants and Cody enter and leave the house at 6344 Hanson at various times during the monitoring. On three occasions during the beeper surveillance, Cody delivered samples of amphetamine allegedly produced by the conspirators.

On August 17, 1977, DEA agents executed a search warrant at 6344 Hanson. In the basement, they found a complete laboratory which expert testimony established was capable of producing amphetamine. The agents did not, however, find any trace of amphetamine on the premises. Investigation revealed that a number of chemical containers and pieces of laboratory equipment bore the fingerprints of defendants Lenk, Sword, Dean and Hines.

The defendants were indicted, along with Cody, for conspiring to manufacture and manufacturing amphetamine in violation of 21 U.S.C. §§ 841(a)(1) and 846. The indictment also charged Cody with ten counts of possessing and distributing amphetamine. However, Cody remained a fugitive and was not tried with the appellants.

The case went to trial on July 18, 1978. The Government's case against the appellants consisted primarily of testimony that all the appellants had been observed in and around the laboratory's location (Dean's home) the day of the search; that Cassity and Sword previously had stored precursor chemicals and laboratory equipment in their homes; that Hines had picked up chemicals and glassware left in a rented van by Agent Graetz; that Lenk was in the laboratory at the time of the search; and that fingerprints of four of the appellants were found on glassware in the laboratory. In addition, the government introduced tape recordings of Cody's numerous telephone conversatons with Agent Graetz, as well as the samples of amphetamine Cody had delivered to Graetz.

The jury convicted all five appellants of conspiracy and manufacturing amphetamine. These are direct appeals from the convictions.

I

Appellants' first assignment of error concerns the decision of the district court to admit Cody's recorded telephone conversations under the coconspirator exception to the hearsay rule. Specifically, the appellants argue the court erred by admitting Cody's out of court statements conditionally, subject to the requirement that the Government's proof establish each defendant was a member of Cody's conspiracy. Furthermore, the appellants question whether there was sufficient independent evidence to support the court's preponderance of the evidence finding of conspiracy. Finally, the appel-

lants argue, even if the evidence did establish a conspiracy, only Cody's statements made after they joined the conspiracy were admissible against them. We reject each of these contentions in turn.

First, the procedure followed by the district court for dealing with the co-conspirator statements clearly was permissible. When the defendants objected to the attempt by the Government to introduce Cody's recorded telephone conversations, the district court adopted the following procedure: The recorded conversations would be admitted conditionally; if the preponderance of the evidence did not establish that each defendant had been a member of Cody's conspiracy, the court would dismiss the conspiracy count and instruct the jury to disregard the tapes. In *United States* v. *Vinson*, 606 F.2d 149, 153 (6th Cir. 1979), *cert. denied*, 444 U.S. 1074, 100 S.Ct. 1020, 62 L.Ed.2d 756 (1980), this court specifically authorized trial courts to deal with hearsay objections to co-conspirator statements by "admit[ting] the hearsay statements subject to later demonstration of their admissibility by a preponderance of the evidence." The ruling of the district court in the present case substantially anticipated our *Vinson* decision and we find no error in the procedure adopted.

Second, we conclude that the evidence was sufficient to support the finding of conspiracy by the district court on the preponderance of the evidence. Cassity, Sword and Dean all stored the precursor chemicals and laboratory equipment in their homes. Hines was identified as the person who accompanied Cody to a prearranged location to pick up a rended van Agent Graetz had filled with chemicals and glassware. Cody, Lenk, Dean and Hines were observed leaving the basement laboratory on August 16, and Cassity drove to and from the laboratory several times on August 17. Fingerprints of all the appellants except Cassity were found on the laboratory equipment seized in the August

17 raid. Appellant Lenk was present in the laboratory when the search took place. Even disregarding the substance of Cody's recorded statements, which the district court could have considered under the decision by this court in *Vinson, supra*, 606 F.2d at 153, there was ample evidence to support the preliminary finding of conspiracy by the court.

Finally, we reject the argument by appellants that only those co-conspirator statements made after they joined the conspiracy are admissible against them. The argument rests upon a part of one sentence from *United States* v. *Petrozziello*, 548 F.2d 20, 23 (1st Cir. 1977), quoted by this court in *United States* v. *Enright*, 579 F.2d 980, 986 (6th Cir. 1978): "if it is more likely than not that the declarant and the defendant were members of a conspiracy *when the hearsay statement was made*," the hearsay may be admissible. (Emphasis added.) In *Petrozziello*, the First Circuit adopted the preponderance of the evidence test for determining admissibility of co-conspirators' statements. Neither *Petrozziello* nor *Enright* concerned the time at which the co-conspirator statements were made. The quoted phrase from *Petrozziello* on which appellants rely is mere dictum and does not represent the law of this Circuit. We are bound by the ruling of the Supreme Court in *United States* v. *United states Gypsum Company*, 333 U.S. 364, 393, 68 S.Ct. 525, 541, 92 L.Ed. 746 (1948):

> With the conspiracy thus fully established, the declarations and acts of the various members, even though made or done prior to the adherence of some to the conspiracy, become admissible against all as declarations or acts of co-conspirators in aid of the conspiracy. (Footnote omitted.)

See also United States v. *Ramirez*, 482 F.2d 807, 816 (2d Cir.), *cert. denied*, 414 U.S. 1070, 94 S.Ct. 581, 38

L.Ed.2d 475 (1973); *United States* v. *Sarno*, 456 F.2d 875, 878 (1st Cir. 1972).

II

The appellants also challenge their convictions on the ground the Government's evidence against them is the fruit of illegal search and seizure and, therefore, should have been suppressed. We remand the cases to the district court to conduct hearings on the suppression issue.

Before trial, defendant-appellant Cassity moved to suppress all evidence the DEA acquired directly or indirectly through the beeper surveillance. He argued that the fourth amendment requires the Government to obtain a warrant to install and monitor beepers, and that the warrants the Government obtained in this case were invalid because unlimited in duration. Consequently, Cassity urged, monitoring the beepers was an illegal search whose fruits must be suppressed. The district court rejected Cassity's argument, holding the use of a beeper is no more than a sophisticated substitute for visual surveillance and does not require a warrant.

Our decision in *United States* v. *Bailey*, *supra*, 628 F.2d 938 (6th Cir. 1980), undercut this ruling of the district court by holding beeper surveillance may invade an individual's legitimate expectations of privacy and, therefore, require a warrant. Furthermore, in *Bailey* we held a warrant containing no time limit does not meet fourth amendment requirements and so cannot legitimate an otherwise invalid search. In *Bailey* we also decided that suppressing the fruits of the monitoring is the appropriate judicial response to illegal beeper surveillance.

Given our *Bailey* decision, the only remaining issue in Cassity's case is whether the beeper surveillance by the Government invaded his legitimate expectations of privacy. Because the district judge held beeper surveillance does not require a warrant, he found it unnecessary to hear evidence on the expectation of privacy is-

sue. As our *Bailey* decision makes clear, the question whether beeper surveillance in a case constitutes a search or seizure requiring a warrant is inextricably intertwined with the question whether the surveillance violated the individual's legitimate expectations of privacy in that particular case. Because the record before this court does not permit us to decide whether the beeper surveillance violated Cassity's legitimate expectations of privacy, we remand the case to the district court for a second suppression hearing.

On remand the district court should undertake the analysis this court outlined in *Bailey*. As we pointed out there, if either the installation or the monitoring of the beeper violated the defendant's legitimate expectations of privacy, the court ordinarily should grant the motion to suppress. In this case, however, the government had rightful possession and control of the cans and heating mantle when the beepers were installed. Accordingly, the installations could not have violated Cassity's privacy expectations. On the other hand, there seems to be dispute that Cassity unsuspectingly took a can of non-contraband chemicals containing a beeper into his home. If the chemicals were stored in an area of the home shielded from public view and protected against warrantless governmental intrusion, Cassity would appear to have exhibited a subjective expectation of privacy which the Government violated by monitoring the beeper's signals. Moreover, if there was such a subjective privacy expectation, *Bailey* indicates it was legitimate. Nevertheless, a final decision on Cassity's suppression motion must await further fact finding by the district court.

Because the remaining appellants did not join in Cassity's pre-trial motion to suppress, their suppression arguments before this court are more troublesome. The Government urges us to hold Lenk, Sword, Hines and Dean waived their fourth amendment objections to

the beeper surveillance by failing to raise them before trial as required by Fed.R.Crim.P. 41(f), 12(b)(3), and 12(f). Although this court ordinarily refuses to consider search and seizure claims not raised by a pre-trial motion, we conclude under the peculiar facts and circumstances of this case the failure of the other appellants to join Cassity in moving to suppress does not bar appellate consideration of their arguments.

As the Supreme Court has recognized, the rule requiring criminal defendants to make their suppression motions before trial "is a crystallization of deicsions ... requiring that procedure, and is designed to eliminate from the trial disputes over police conduct not immediately relevant to the question of guilt." *Jones* v. *United States*, 362 U.S. 257, 264, 80 S.Ct. 725, 732, 4 L.Ed.2d 697 (1959), overruled on other grounds, *United States* v. *Salvucci*, ____ U.S. ____, 100 S.Ct. 2547, 65 L.Ed.2d 619 (1980). The rationale usually given for removing suppression questions from the trial itself is that "interrupt[ing] the course of the trial for such auxiliary inquires impedes the momentum of the main proceeding and breaks the continuity of the jury's attention." *Nardone* v. *United States*, 308 U.S. 338, 342, 60 S.Ct. 266, 268, 84 L.Ed.307 (1939). *See Giacona* v. *United States*, 257 F.2d 450, 455 (5th Cir.), *cert. denied*, 358 U.S. 873, 79 S.Ct. 113, 3 L.Ed.2d 104 (1958). Furthermore, a pre-trial decision whether the challenged evidence is admissible gives the Government the time and flexibility to change its theory of the case, to develop or place greater reliance upon untainted evidence or otherwise to modify its trial strategy in response to an adverse ruling. *See United States* v. *Rollins*, 522 F.2d 160, 166 (2d Cir. 1975), *cert. denied*, 424 U.S. 918, 96 S.Ct. 1122, 47 L.Ed.2d 324 (1976); *United States* v. *Sisca*, 503 F.2d 1337, 1348 (2d Cir.), *cert. denied*, 419 U.S. 1008, 95 S.Ct. 328, 42 L.Ed.2d 283 (1974).

In applying the pre-trial motion rule, "we are dealing with and carrying out an important social policy and not a narrow, finicky procedural requirement." *Jones* v. *United States*, *supra*, 362 U.S. at 264, 80 S.Ct. at 732. Where the rule's underlying policy is not implicated, its technical requirements should not be allowed to prevail over constitutional rights.

In the present case, consideration of the remaining appellants' fourth amendment claims does not jeopardize the Government's interests. Cassity's pre-trial notice raised the beeper issue in timely fashion. The trial court heard evidence and argument about the beeper surveillance and its fourth amendment implications. Had the court granted Cassity's motion to suppress, the remaining defendants presumably would have filed similar motions. These also could have been dealt with before trial without impairing the flexibility of the Government in proceeding with the prosecution. However, the district court concluded as a matter of law beeper surveillance does not constitute a search within the meaning of the fourth amendment. Additional fourth amendment challenges by the other appellants raising the identical legal issue would neither have altered the court's ruling nor served the purposes of the pre-trial motion rule. Under these circumstances, we hold the remaining appellants did not waive their fourth amendment objections by neglecting to perform the useless and purely formal act of joining Cassity in moving to suppress. *See United States* v. *Love*, 472 F.2d 490, 493 n.4, 496 (5th Cir. 1973); *United States* v. *Lefkowitz*, 284 F.2d 310, 313 n.1 (2d Cir. 1960).

The judgments of conviction are vacated and the cases are remanded to the district court for hearings on the suppression issue. Appellants Lenk, Sword, Hines and Dean shall be permitted to join in Cassity's motion to suppress. Because fourth amendment rights are personal, *Rakas* v. *Illinois*, 439 U.S. 128, 133-34, 99 S.Ct.

421, 425, 58 L.Ed.2d 387 (1978), the district court should consider the claim of each appellant separately. The court shall order a new trial for, and grant the suppression motion of, each appellant whose legitimate expectations of privacy are found to have been violated by the beeper surveillance. *See United States* v. *Bailey*, *supra*. Any appellant whose fourth amendment rights were not violated has no right to a new trial, and his conviction should be reinstated. *Cf. Rakas* v. *Illinois*, *supra*, 439 U.S. at 134, 99 S.Ct. at 425; *United States* v. *Hunter*, 550 F.2d 1066, 1074-75 (6th Cir. 1977).

APPENDIX C

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

Criminal Action No. 77-80932

UNITED STATES OF AMERICA, PLAINTIFF

v.

LARRY WAYNE CASSITY, RAYMOND LEE DEAN, TERRY GENE HINES, STEPHEN GORDON LENK, AND BILLY SWORD, DEFENDANTS.

OPINION

Defendants successfully challenged their 1978 convictions for conspiring to manufacture and manufacturing amphetamine, a controlled substance, on the grounds that the evidence by which they were convicted was the fruit of illegal electronic surveillance. The United States Court of Appeals for the Sixth Circuit held that the search warrants pursuant to which the beepers were installed in two cans of chemicals and a heating mantle did not meet the requirements of the Fourth Amendment because they contained no expiration date or time limit, *See United States* v. *Cassity*, 631 F.2d 461 (6th Cir. 1980), and remanded the case to me for an evidentiary hearing on whether beeper (i.e., electronic homing device) surveillance violated each defendant's reasonable and legitimate expectation of privacy. I have been instructed to undertake the analysis set forth in *United States* v. *Bailey*, 628 F.2d 938 (6th Cir. 1980), to determine whether the evidence seized as a result of the beeper surveillance should be suppressed.

I.

At an evidentiary hearing, defendant Cassity testified that he had resided at 2803 Stair, Detroit, for

twenty to twenty-five years with his mother and father. His girlfriend also resided at this address and shared a bedroom with him. Cassity acknowledged that he had stored a green can of chemicals in the garage at the residence, although the can of chemicals was not his. The garage was kept locked and, even though other members of the residence had access to the garage, Cassity expected privacy when he placed the chemicals there for storage.

Defendant Hines testified that he drove a yellow van from Eight Mile and Greenfield Roads to a parking lot at the request of Cody, an alleged co-conspirator. Hines alleges that he had no knowledge there was a blue can of chemicals and a heating mantle in the rear of the van as there was an immovable partition behind the driver and passenger seats which precluded any view into the rear compartment. Similarly, no windows allowed a view of the contents of the compartment. Hines contends that he had a reasonable expectation of privacy in the van even though the van had been rented and he had been requested to move it by someone other than the owner.

The 1494 Calvary, Detroit, address is a quadruplex, part of which was rented by defendant Sword and his friend. Sword lived there with his girlfriend and his friend, the friend's wife, and child. Only Sword and his friend had a key to the basement, which was normally kept locked and where at least one of the cans of chemicals was located. Other individuals were permitted access to the basement, including his friend's mother-in-law who lived next door. Sword maintains that he expected the residence to be private, although it was shared by others, and that those persons living in the apartment had exclusive control of the premises.

The Dean family owned the 6344 Hanson, Detroit, residence where the cans of chemicals and the clandestine laboratory were located. Defendant Lenk was a

guest in that house for four days prior to its search on August 17, 1977. Lenk shared meals at the residence, kept his personal belongings there during his stay, and had the right to come and go when he so desired. Lenk contends that he reasonably expected privacy at that address by virtue of his guest status.[1]

II.

In this case, since the Court of Appeals has held that the search warrants secured for the installation of the beepers in the cans of precursor chemicals and the heating mantle were invalid because they contained no termination date,[2] *United States* v. *Cassity*, *supra*, at 464, the intrusion and searches must be analyzed as warrantless searches.

Warrantless searches may be valid if they are not "unreasonable". A search is unreasonable if it violates a person's reasonable, legitimate expectation of privacy. The United States Supreme Court has indicated that a reasonable expectation of privacy is determined by a two-pronged test. *Katz* v. *United States*, 389 U.S. 347, 361 (1967) (Harlan, J., concurring); *Smith* v. *Maryland*, 442 U.S. 735 (1979). *Accord*, *United States* v. *Bailey*, *supra*, at 941. First, the defendant must exhibit a subjective expectation of privacy, defined from

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[1] An indictment against defendant Dean on the same charges was dismissed at the evidentiary hearing held on the motion to suppress.

[2] I note as a matter of clarification that Search Warrant No. 780866, authorizing the search of the blue five-gallon can of benzene, was not open-ended, but authorized the search for three days. Presumably, then, that search warrant was valid for that period of time. However, since the can of benzene did not move during that time and, more important, a distinction drawn between the beeper in the benzene can and the other two beepers would have no practical effect in light of my decision in this case, I will address the issues in the beeper searches categorically.

an examination of the totality of the circumstances. *Rawlings* v. *Kentucky*, 448 U.S. 98, n.3 at 104 (1980). Second, the expectation must be one that society is prepared to recognize as legitimate, a more objective test. *Rakas* v. *Illinois*, 439 U.S. 128 (1978).

> Legitimation of expectations of privacy by law must have a source outside of the Fourth Amendment, either by reference to concepts of real or personal property law or to understandings that are recognized and permitted by society. One of the main rights attaching to property is the right to exclude others, see W. Blackstone, Commentaries, Book 2, ch. 1, and one who owns or lawfully possesses or controls property will in all likelihood have a legitimate expectation of privacy by virtue of this right to exclude. Expectations of privacy protected by the Fourth Amendment, of course, need not be based on a common-law interest in real or personal property, or on the invasion of such an interest. . . . But by focusing on legitimate expectations of privacy in Fourth Amendment jurisprudence, the Court has not altogether abandoned use of property concepts in determining the presence or absence of the privacy interests protected by that Amendment.

439 U.S. at 144, n.12. In undertaking the analysis of each defendant's professed expectation of privacy in this instance, I must bear in mind the admonition of the Supreme Court in its discussion of Fourth Amendment protection:

> [T]he Fourth Amendment protects people, not places. What a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection. But what he seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected.

Katz v. *United States*, *supra*, at 351 (citations omitted).

With these precepts in mind, I now turn to each individual defendant's claim.

I find that Cassity has a reasonable subjective expectation of privacy in his parents' house and, therefore, the garage. Cassity need not have a possessory interest in the house to assert a reasonable expectation of privacy therein, nor does he need to own the chemicals. These are merely factors to consider when determining if a person has established a sufficient interest to be protected pursuant to the Fourth Amendment. A person can have a legally sufficient interest in a place so that the Fourth Amendment protects him from unreasonable governmental intrusion into that place. *Jones* v. *United States*, 362 U.S. 257, 263 (1960). Cassity testified that he had resided with his parents for twenty to twenty-five years at the Stair Street address. He has reason to expect that his parents' home and, correspondingly, his own interest in it would remain protected from unreasonable searches in the absence of exigent circumstances or consent. *See United States* v. *Matlock*, 415 U.S. 164 (1974). Similarly, Cassity's expectation of privacy is legitimate. Possession of the chemicals was not illegal since they are not contraband *per se*. *See United States* v. *Bailey*, *supra*. Likewise, they were not being used for an illegal purpose nor was there probable cause at the time of the intrusion to suspect Cassity of participation in a conspiracy to manufacture and distribute amphetamines. There is no evidence of consent to search the garage by any member of the family nor is there evidence of exigent circumstances that would justify a warrantless intrusion. I find that Cassity has demonstrated a reasonable and legitimate expectation of privacy in the garage.

Defendant Sword contends that he had a reasonable expectation of privacy in a quadruplex that he shared with his girlfriend and three other persons. The government argues that Sword had no such expectation

since he never admitted ownership or knowledge of the cans and there was no evidence that he stored the cans in a "protected" area of the house.

Absent consent or exigent circumstances, entry into a person's home to conduct a search has consistently been held to be unreasonable under Fourth Amendment protections unless it is conducted pursuant to a warrant. *Steagald* v. *United States*, 49 U.S.L.W. 4418 (1981); *Payton* v. *New York*, 445 U.S. 573 (1980); *Johnson* v. *United States*, 333 U.S. 10 (1948). The degree to which Fourth Amendment protections are extended to apartments and shared dwellings is less certain. The Court of Appeals for the Sixth Circuit has held, however, that tenants have the same expectation of privacy in their apartments as homeowners in their houses. *United States* v. *Carriger*, 541 F.2d 545, 550-552 (6th Cir. 1976). The Court referred to *McDonald* v. *United States*, 335 U.S. 451 (1948), and *Fixel* v. *Wainwright*, 492 F.2d 480 (5th Cir. 1974), when it held:

> "But it seems to me [Jackson, J., concurring] that each tenant of a building, while he has no right to exclude from the common hallways those who enter lawfully, does have a personal and constitutionally protected interest in the integrity and security of the entire building against unlawful breaking and entry. . . ."
>
> [*McDonald* v. *United States*], 335 U.S. at 458-59, 69 S.Ct. at 194-195.
>
> . . . The officer's entry into this locked apartment building without permission and without a warrant of any kind was an illegal entry and violated appellant's Fourth Amendment rights. Accordingly, the evidence obtained as a result of the unauthorized entry should have been suppressed.
>
> * * *
>
> . . . [T]here can be no difference in the tenant's subjective expectation of privacy, and no difference in

the degree of privacy that the Fourth Amendment protects.

* * *

"Contemporary concepts of living such as multi-unit dwellings must not dilute Fixel's right to privacy any more than is absolutely required. . . ." [*Fixel* v. *Wainwright*], 492 F.2d at 484 (footnote omitted).

541 F.2d at 550-552. Similarly, though less directly, the United States Supreme Court in *Jones* v. *United States*, *supra*, at 266, sanctioned the protection of the Fourth Amendment rights for apartment dwellers and others by refusing to distinguish among terms of such "gossamer strength" as lessee, licensee, invitee and guest.

The tenets expressed in these cases clearly support defendant Sword's claim. It is irrelevant that Sword lived in an apartment. Moreover, the fact that the rooms were shared with four other persons is of no significance. Homeowners may reside in houses with others and expect no less privacy than if they resided alone. I find no reason to hold that apartment dwellers have any less expectation of privacy. In either case the principal resident—homeowner or lessee—risks the consent of another resident to a search of the home. *See, e.g., United States* v. *Matlock supra*, (a third person, other than the defendant, may give valid consent to search the defendant's premises or effects if that third person has common authority over them). *Accord, United States* v. *Sumlin*, 567 F.2d 684 (6th Cir. 1977), *cert. denied*, 435 U.S. 932 (1978). In that instance, there would be no reasonable subjective expectation of privacy. In this case no such consent was given. Rather the testimony elicited from Sword at the evidentiary hearing indicates that only those persons who obtained permission from Sword or his friend could gain entry to the basement where the chemicals were

stored. Furthermore, Sword also maintained a legitimate expectation of privacy. The chemicals were not contraband *per se* and the possession of them, absent probable cause to link them and their owner with a specific drug manufacturing scheme, is not illegal. *United States* v. *Bailey, supra*, at 944. There is no evidence that the government obtained consent to search the quadruplex from an occupant and there is no independent evidence to indicate that Sword participated in the overall drug conspiracy at the time that the beepers were monitored in the quadruplex. Therefore I hold that the monitoring of the beepers at 1494 Calvary violated Sword's reasonable and legitimate expectation of privacy.

Stephen Lenk contends that he had a reasonable expectation of privacy in the residence of Raymond Dean, particularly in the basement of the house. Lenk was arrested in the basement when it was searched. He had been a guest in the house for several days preceding the search and had his personal effects, including clothing, toiletries, pamphlets, formulas, and books, in the basement. Some of these items were contained in a duffel bag that was searched.

The government counters that Lenk did not have any expectation of privacy because he did not own the house and because there is no legitimate expectation of privacy in a clandestine laboratory. The latter argument is based on *United States* v. *Clayborne*, 584 F.2d 346, 348 (10th Cir. 1978). It is also argued that the search of the house was conducted pursuant to a valid search warrant.

I cannot agree with the government's position in this instance. The concepts of possession or ownership are not the tests for Fourth Amendment protections any more than is the concept of "legitimately on the premises". *See Rakas* v. *Illinois, supra*, at 143-48. Indeed, the *Rakas* decision implies that there are circum-

stances in which a visitor could object to a search of a house.

> For example, applied literally, this statement [legitimately on the premises] would permit a casual visitor who has never seen, or been permitted to visit, the basement of another's house to object to a search of the basement if the visitor happened to be in the kitchen of the house at the time of the search. ... The ... visitor would have absolutely no interest or legitimate expectation of privacy in the basement ... and it advances no purpose served by the Fourth Amendment to permit ... [him] to object to the lawfulness of the search.[11]

[11] This is not to say that such visitors could not contest the lawfulness of the seizure of evidence or the search if their own property were seized during the search.

439 U.S. at 142 & n.11. Furthermore, although the court in *Rakas* rejected the automatic standing doctrine of *Jones* v. *United States*, *supra*, it recognized that Jones had a legitimate expectation of privacy that permitted him to assert the protections of the Fourth Amendment. *Rakas*, *supra*, at 149. Lenk's claim is analogous to that of Jones. Both had permission to use the premises although they did not pay rent for its use, both had short visits, both kept personal belongings at the visited residence, and both were free to enter and leave as they desired. Lenk clearly was more than a casual visitor. The testimony at the evidentiary hearing indicates that he had been a guest for at least two days and that he was expected to stay for an indeterminate period of time. The testimony also indicates that Lenk subjectively expected Dean's home, and thereby his own personal belongings in the house, to be free from warrantless governmental intrusion.

Similarly, Lenk has a legitimate expectation of privacy akin to that of Jones. Both had permission to use the premises without restriction. The court in *Jones* held

that "wrongful" presence at the scene of the search would preclude the legitimacy of the expectation. *Jones*, *supra*, at 267. However, implied in the term "wrongful", as used by the court in *Jones* and *Rakas*, is not the legality of the *use* of the place searched but the *occupancy* of the place.[3] See *Rakas*, *supra*, at 141 n.9. If one recalls that the Fourth Amendment protects "persons, not places", the logic of the analysis is obvious.

I am not persuaded by the government's assertion that a clandestine laboratory is not within the scope of the Fourth Amendment protections pursuant to *United States* v. *Clayborne*, *supra*. With due respect, I conclude that such reasoning is reverse logic—one uses the fruits of an illegal search to justify its legality. The Fourth Amendment specifically requires probable cause to precede the search and it is not to be discovered as the results of one.[4]

The government contends that the evidence seized as a result of the search of the basement is admissible because the monitoring of the house began before Lenk arrived and a warrant was obtained for the search of the house.[5] The monitoring was done at all times without a warrant. The government argues that the surveil-

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[3] This does not imply that all legitimate occupants of a residence have a right to challenge a search. *See, e.g., Northern* v. *United States*, 455 F.2d 427 (9th Cir. 1972); *United States* v. *Tussell*, 441 F. Supp. 1092 (M.D. Pa. 1977).

[4] This requirement is one of the principal reasons for sustaining the need for administrataive warrants. *See Marshall* v. *Barlow's, Inc.*, 436 U.S. 307 (1978); *Camera* v. *Municipal Court of San Francisco*, 387 U.S. 523 (1967); *See* v. *City of Seattle*, 387 U.S. 541 (1967).

[5] Again it is worth noting that Search Warrant No. 780927, authorizing the search of 6344 Hanson Street in Detroit, contained no termination date. However, the Court of Appeals did not address the legality of that warrant and my conclusions do not necessitate a ruling on its validity.

lance of the Hanson Street residence has not been tainted by the previous monitoring of the beepers at the other addresses., It relies for this contention on *United States* v. *Stephenson:*

> In the instant case the beeper surveillance evidence within the house and that within the laboratory *do not come together as one connected transaction. The agents lost contact with the device following the movement from the house.* An independent effort was necessary to establish contact. So the laboratory contact is not tainted by the surveillance within the house.

490 F. Supp. at 624, citing *United States* v. *Clayborne, supra,* at 349-50 (emphasis supplied in *Stephenson*). Underlying this reasoning is the premise that there was no expectation of privacy in a clandestine laboratory.

I find two flaws in this argument. First, I previously stated that discovery of a clandestine laboratory as the result of a warrantless search is insufficient to justify the initial intrusion. Hence I do not agree that the mere interruption of beeper surveillance is enough to purge the taint of the initial warrantless search (*see Wong Sun* v. *United States,* 371 U.S. 471 (1965)), since both the laboratory and the homes in this case are subject to Fourth Amendment protections. Second, the presence or absence of an individual from the premises cannot be used to validate an otherwise illegal search. I must presume that Dean expected his home to be free from warrantless intrusions by the government. Lenk maintained a legitimate expectation of privacy in the Hanson Street residence for the reasons that I have previously discussed. A guest may risk his host's consent to governmental searches just as an individual who shares his full-time residence with others may so do. *See United States* v. *Matlock, supra.* Yet in the absence of proof of such consent I cannot presume that Lenk had a diminished expectation of privacy merely because he arrived several days after an initial illegal surveillance began.

Terry Hines argues that he has a reasonable expectation of privacy in the rented van in which the benzene and heating mantle were transported. The van was rented by the government, the items were placed in the rear of the van by Drug Enforcement Agency ("DEA") special agents and Hines testified that he had no knowledge that the chemicals or heating mantle were present in the van because of the manner in which the rear compartment was constructed.

The test that I must use to determine Hines' reasonable expectation of privacy combines the question of "standing" to challenge the search and the substantive claim of a legitimate expectation of privacy into whether governmental officials violated any legitimate expectation of privacy held by petitioner. *Rawlings* v. *Kentucky*, *supra*, at 106. Only those persons whose Fourth Amendment rights have been violated are entitled to the protection of the exclusionary rule. *United States* v. *Salvucci*, 448 U.S. 83, 86 (1980); *Rakas*, *supra*, at 134. Hines has stated that he expected the van to be free from governmental intrusion, i.e., he exhibited a subjective expectation of privacy.

I find Hines' position untenable. It is helpful to analyze subjective expectations of privacy in terms of the pre-*Rakas* notions of "standing" with relation to Fourth Amendment rights.

An individual has standing to sue if the challenged action has caused him injury in fact and the injury was to an interest "arguably within the zone of interests to be protected" by the violation. *United States* v. *Students Challenging Regulatory Agency Procedures (SCRAP)*, 412 U.S. 669 (1973); *Association of Data Processing Service Organizations, Inc.* v. *Camp*, 397 U.S. 150 (1970); *Barlow* v. *Collins*, 397 U.S. 159 (1970). Obviously, a potential conviction will inure harm to Hines. However, it is difficult for me to understand Hines' con-

tention that he is within the zone of Fourth Amendment protection.

The Fourth Amendment protects an individual from unreasonable searches or seizures. It also protects the *individual* and not the *locus* of the search or seizure. *See Katz* v. *United States*, *supra*. Therefore, Hines must expect to be protected, not just blithely exist in an insular environment. An individual normally and overtly manifests expectations of privacy in certain aspects of his daily life. He does not expect his telephone to be tapped nor his bedroom to be bugged. A closed compartment generally may be assumed to contain items not intended for general knowledge. An individual's car, however, is not subject to the same expectations because its contents are generally open to view and it is inherently mobile. *United States* v. *Chadwick*, 433 U.S. 1 (1977); *South Dakota* v. *Opperman*, 428 U.S. 364 (1976); *United States* v. *Martinez-Fuerte*, 428 U.S. 543, 561 (1976); *Chambers* v. *Maroney*, 399 U.S. 42 (1970); *Cooper* v. *California*, 386 U.S. 58 (1967). A car that does not belong to an individual but is either rented or loaned to him may be subject to even a lesser degree of privacy. *See United States* v. *McConnell*, 500 F.2d 347 (5th Cir. 1974), *cert. denied*, 420 U.S. 946 (1975).

In *McConnell*, the Court of Appeals held that the defendant lacked standing to contest a search of a rented automobile. Defendant, an alleged wholesale marijuana distributor, rented the car to facilitate the transportation of marijuana by a third person. He was convicted on evidence seized during a search of the car when he was not a driver or passenger. The Court summarily dismissed the appeal from denial of the motion to suppress the evidence, holding that the search was not directed against the defendant nor did he show that he had a reasonable expectation of privacy with respect to the rented vehicle.

The relationship between Hines and the van in this is even more attenuated than in *McConnell*. Hines did not rent the vehicle, the government did. He testified that his only purpose in driving the van was to move it from one parking lot to another. He also attested to the fact that he did not know that there were chemicals or a heating mantle within the van. It is inconceivable that any person having such a transient interest in a vehicle can manifest a subjective or legitimate expectation of privacy.[6] Hence I hold that the search of the vehicle was not a violation of Hines' Fourth Amendment rights.

III.

Defendants urge suppression of the evidence seized from 6344 Hanson as fruits of an illegal search. I have concluded that Hines showed no reasonable expectation of privacy in the van and, therefore, the evidence seized as a result of beeper monitoring should not be suppressed as "fruits of the poisonous tree" as to Hines. *Wong Sun* v. *United States*, *supra*, at 491-92. The remaining defendnats, Cassity, Sword and Lenk, have asserted that the same evidence should be suppressed.[7] I need not reach this issue for the reasons set forth in Part IV. of this opinion.

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[6] I distinguish this case from the instance of passengers in a vehicle. *See, e.g., Rios* v. *United States*, 364 U.S. 253 (1960); *United States* v. *Tolbert*, No. 80-80253 (E.D. Mich. filed June 29, 1981). In both cases, the passengers expressed a more tangible interest in the vehicle and its contents.

[7] Defendant Lenk also challenges the legality of the search of his parachute bag, in which the formulae and procedures for the synthesis of amphetamines were discovered. This issue was not addressed by the Court of Appeals and I find it unnecessary to resolve the issue at this time.

IV.

Having decided that Cassity, Sword and Lenk have demonstrated a reasonable expectation of privacy in the various locations where a beeper was monitored, I now must decide if I should grant the motion to suppress with regard to the evidence seized at 6344 Hanson.

The Court of Appeals stated that "if either the installation or the monitoring of the beeper violated the defendant's legitimate expectations of privacy, the court *ordinarily* should grant the motion to suppress." *United States* v. *Cassity*, *supra*, at 465 (emphasis added). Although the Court of Appeals has decided that the analysis in *Bailey* should be undertaken to determine the defendants' Fourth Amendment rights, and I have done that, my decision on the suppression motion also turns on the application of the exclusionary rule. The illegal searches in this case took place during July and August, 1977. In *Bailey*, the beepers were monitored almost a full year later. The decision in *Bailey* was not rendered until July 31, 1980, three years after the illegal monitoring in this case took place. Therefore, application of the exclusionary rule in this case will make *Bailey* retroactive. I have reviewed numerous cases discussing retroactive application of the exclusionary rule and, for the following reasons, I decline to apply the rule in this case.

The purpose of the exclusionary rule is two-fold—to deter future illegal police conduct and to assure judicial integrity. It is not to redress or make whole the injury to the privacy of the search victim.

> [T]he ruptured privacy of the victims' homes and effects cannot be restored. Reparation comes too late.

Linkletter v. *Walker*, 381 U.S. 618, 637 (1965).

> The rule is calculated to prevent, not to repair. Its purpose is to deter—to compel respect for the constitutional guaranty in the only effectively avail-

able way—by removing the incentive to disregard it.

Elkins v. *United States*, 364 U.S. 206, 217 (1960).

In sum, the rule is a judicially created remedy designed to safeguard Fourth Amendment rights generally through its deterrent effect, rather than a personal constitutional right of the party aggrieved.

United States v. *Calandra*, 414 U.S. 338, 348 (1973).

The application of the exclusionary rule as a prospective remedy has evolved away from traditional Blackstonian notions that judges discover the law that has always been in existence and do not create new law.[8] The Constitution does not specifically provide for the retroactive or nonretroactive application of any of its clauses or protections. *Johnson* v. *New Jersey*, 384 U.S. 719 (1966). However, constitutional rules of criminal procedure may be made "prospective ... where the exigencies of the situation require such an application." *Johnson* v. *New Jersey*, *supra*, at 726-27; *Tehan* v. *Shott*, 382 U.S. 406 (1966); *Linkletter* v. *Walker*, *supra*. The criteria to be used in the determination of retroactive application is based on the purpose to be served by the new standards, the extent of reliance by law enforcement officers on the old standards, and the effect on administration of justice of the new standards. *Stovall* v. *Denno*, 388 U.S. 293, 297 (1967); *Linkletter* v. *Walker*, *supra*. *Accord*, *United States* v. *Black*, 480 F.2d 504 (6th Cir. 1973). The most important factor in this trio is the purpose to be served by the new standard.

[If the purpose] is to overcome an aspect of the criminal trial that substantially impairs its truth-finding function and so raises serious questions

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[8] *See Kuhn* v. *Fairmont Coal Co.*, 215 U.S. 349, 372 (1910) (Holmes, J., dissenting). "Judicial decisions have had retrospective operation for nearly a thousand years."

> about the accuracy of guilty verdicts in past trials, the new rule has been given completely retroactive effect.

Williams v. *United States*, 401 U.S. 646, 653 (1971). *See also Ivan* v. *City of New York*, 407 U.S. 203 (1972); *United States* v. *Black*, *supra*, at 509.

The purpose of the imposition of the exclusionary rule in *Bailey* was based on the holding that beeper surveillance of non-contraband personal property in private areas "trenches upon legitimate expectations of privacy'. *Bailey*, *supra*, at 944. Hence, a warrant that included a "reasonable" termination date is required to protect the defendants' Fourth Amendment rights. *Bailey*, *supra*, at 945-46. In applying the *Williams* test, *supra*, I find that exclusion of evidence gained through illegal searches does not enhance the fact-finding process at trial but, instead, curtails it by permitting the alleged victim of an illegal search to suppress its admission. Neither does the rule requiring a warrant with a reasonable termination date question the accuracy of guilty verdicts in the past. Evidence obtained from beeper monitoring without a warrant could only serve to confirm the other evidence used to convict a defendant. Illegally gained evidence is rarely suppressed if it has no bearing on the outcome of a trial. Therefore both tests articulated in *Williams* for the first criteria in the application of retroactivity are inapplicable in this case.

The second consideration involves an analysis of the extent to which law enforcement officers relied on old standards. In this case the DEA agents were acting within the boundaries of the law as it was defined by the Supreme Court prior to the searches. Although in the *Bailey* decision the Court of Appeals relies on *Berger* v. *New York*, 388 U.S. 41 (1967), that case is distinguishable because it involved wiretapping and not beeper surveillance. In *Berger*, the Court invalidated a

New York wiretap statute authorizing two-month surveillance periods because each two-month period could be based on a single showing of probable cause, two-month extensions could be obtained without a new showing, and no termination date was required even though the sought-after conversation was seized. *Accord, United States* v. *Lamonge*, 458 F.2d 197 (6th Cir.), *cert. denied*, 409 U.S. 863 (1972). Wiretapping constitutes an actual invasion into an individual's privacy by monitoring conversations and affirmative actions of an individual. *See Katz* v. *United States, supra.* However, beepers have often been construed as extensions of visual surveillance that enhance the physical senses of law enforcement officers. *United States* v. *Dubrofsky*, 581 F.2d 208, 211 (9th Cir. 1978); *United States* v. *Moore*, 562 F.2d 106, 112 (1st Cir. 1977), *cert. denied sub nom. Bobisink* v. *United States*, 435 U.S. 926 (1978). Analogies may also be drawn to the use of pen registers and card drops, both of which determine the numbers of outgoing calls by recording devices without monitoring the content of the calls. These devices are not prohibited under Title III of the Omnibus Crime Control and Safe Streets Act, 18 U.S.C. §§ 2510-20 since the "device does not hear sound and therefore does not accomplsih any 'interception' of wire communications as that term is defined by 18 U.S.C. § 2510(4)." *United States* v. *Giordano*, 416 U.S. 505, 553-54 (1974) (Powell, J., concurring in part and dissenting in part); *United States* v. *New York Tel. Co.*, 434 U.S. 159, 165-168 (1977); *Michigan Bell Tel. Co.* v. *United States*, 565 F.2d 385, 388 (6th Cir. 1977). The courts in *New York Telephone* and *Michigan Bell Telephone* did hold, however, that the searches were subject to Fourth Amendment protective requirements. Neither case specified time limitations that would be considered reasonable, although the warrant in *Michigan Bell* contained a twenty-day maximum and the

warrant in *New York Telephone* was extended an additional twenty days past its twenty-day limit. Nor, was there any indication that a time limit was necessary.[9] The Court of Appeals in *Bailey* did not offer any further guidance on the issue of time limitations than any prior decision, holding only that "reasonable" time limits were required based, in part, on Judge Churchill's interpretation of federal statutory authority implementing the Fourth Amendment. Yet Judge Churchill based his reasoning on the Omnibus Crime Control and Safe Streets Act, *see Bailey*, 465 F. Supp. 1138 (E.D. Mich. 1979), which is of questionable authority in cases pertaining to beepers as indicated by the telephone monitoring cases. He further intepreted Fed.R.Crim.P. 41(c)(4), limiting a search warrant to ten days, to require an expiration date on all warrants. At most, I would interpret this theory to indicate that the warrant expires in ten days, not that the warrant is entirely invalid.

I find that it was reasonable for the DEA agents to rely on previous standards requiring a search warrant for physical surveillance, such as those articulated in the telephone cases. I also find that it was reasonable for them to have distinguished between monitoring aural conversations as in wiretaping and the physical surveillance of beeper tracking. The agents acted in good faith and obtained warrants for the installation of the beepers. The natural corollary is that the beepers will be monitored. In the absence of any previous analogous beeper searches that have been invalidated, I hold that

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[9] For example, the Supreme Court stated, "... the requirement of Rule 41(c)(1) that the warrant command that the search be conducted within 10 days of its issuance does not mean that the duration of a pen register surveillance may not exceed 10 days. Thus the District Court's order, which authorized surveillance for a 10-day period, did not conflict with Rule 41." *United States* v. *New York Telephone Co.*, *supra*, at 169 n.16.

the agents were justified in their reliance on the old standard and exercised good faith when they secured warrants for the beeper surveillance.

The Supreme Court in *Michigan* v. *Tucker*, 417 U.S. 433, 447 (1974), held:

> The deterrent purpose of the exclusionary rule necessarily assumes that the police have engaged in willful, or at the very least negligent, conduct which has deprived the defendant of some right. By refusing to admit evidence gained as a result of such conduct, the courts hope to instill in those particular investigating officers, or in their future counterpats, a greater degree of care toward the rights of an accused. Where the official action was pursued in complete good faith, however, the deterrence rationale loses much of its force.

417 U.S. at 447. Not only are the officers in this case justified in their reliance on the old rule but application of the exclusionary rule would serve little benefit.

The final criteria to apply is whether the decision will affect the administration of justice. Little thought is needed to imagine the increased burden on the courts resulting from evidentiary hearings in each case where beeper surveillance is used. I have some doubt that the outcome of each defendant's trial in this case would be affected by retroactive application, since there was other substantial evidence of guilt, although justice for future defendants would be preserved by prospective application of the new rule.

The United States Supreme Court has summarized the retroactive application of the exclusionary rule in *United States* v. *Peltier*, 422 U.S. 531, 535 (1975):

> It is indisputable, however, that in every case in which the Court has addressed the retroactivity problem in the context of the exclusionary rule, whereby concededly relevant evidence is excluded in order to enforce a constitutional guarantee that does not relate to the integrity of the factfinding

process, the Court has concluded that any such new constitutional principle would be accorded only prospective application. *Linkletter* v. *Walker*, 381 U.S. 618 (1965); *Johnson* v. *New Jersey*, 384 U.S. 719 (1966); *Stovall* v. *Denno*, *supra*; *Fuller* v. *Alaska*, 393 U.S. 80 (1968); *Desist* v. *United States*, 394 U.S. 244 (1969); *Jenkins* v. *Delaware*, 395 U.S. 213 (1969); *William* v. *United States*, *supra*; *Hill* v. *California*, 401 U.S. 797 (1971).

We think that these cases tell us a great deal about the nature of the exclusionary rule, as well as something about the nature of retroactivity analysis. Decisions of this Court applying the exclusionary rule to unconstitutionally seized evidence have referred to "the imperative of judicial integrity," *Elkins* v. *United States*, 364 U.S. 206, 222 (1960), although the Court has relied principally upon the deterrent purpose served by the exclusionary rule. (Citations omitted).

When it came time to consider whether those decisions would be applied retroactively, however, the Court recognized that the introduction of evidence which had been seized by law enforcement officials in good-faith compliance with then-prevailing constitutional norms did not make the courts "accomplices in the willful disobedience of a Constitution they are sworn to uphold." *Elkins* v. *United States*, *supra*, at 223.

* * *

The teaching of these retroactivity cases is that if the law enforcement officers reasonably believed in good faith that evidence they had seized was admissible at trial, the "imperative of judicial integrity" is not offended by the introduction into evidence of that material even if decisions subsequent to the search or seizure have broadened the exclusionary rule to encompass evidence seized in that manner.

422 U.S. at 535-37. *Accord, United States* v. *Calandrella*, 605 F.2d 236 (6th Cir.), *cert. denied sub nom. Kaye* v. *United States*, 444 U.S.991 (1979).

In this case, application of the exclusionary rule will not deter the agents who acted in good faith since *Bailey* serves that purpose, nor will it remedy the harm that has accrued to the victims of the search. In *Desist* v. *United States*, *supra*, at 254 n.24, the Supreme Court stated, "[W]e simply decline to extend the court-made exclusionary rule to cases in which its deterrent purpose would not be served." Neither is the integrity of this court questioned because it is not applied. The rule is fashioned by the court but its application is not mandatory where no useful purpose is served. Therefore I decline to apply the exclusionary rule and deny defendants' motion to suppress the evidence seized as a result of the beeper monitoring.

V.

Defendants Cassity, Sword and Lenk have shown a reasonable, legitimate expectation of privacy in the various addresses through which the precursor chemicals were traced by the beepers. However, I deny their motions to suppress the evidence from the illegal search because no useful purpose would be served by applying the exclusionary rule retroactively. Defendant Hines has no reasonable expectation of privacy in the rented van, and his motion to suppress is denied.

The evidence seized as a result of the beeper surveillance is admissible against all defendnats, no new trials are ordered, and their convictions are reinstated.

An appropriate order may issue.

/s/ _____

JOHN FEIKENS

Chief United States District Judge

Dated: August 27, 1981

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

Criminal Action NO. 77-80932

UNITED STATES OF AMERICA, PLAINTIFF,

v.

LARRY WAYNE CASSITY, RAYMOND LEE DEAN, TERRY GENE HINES, STEPHEN GORDON LENK, AND BILLY SWORD, DEFENDANTS

ORDER DENYING DEFENDANTS' MOTIONS TO SUPPRESS

At a session of said Court, held in the Federal Building and United States Courthouse, City of Detroit, County of Wayne, State of Michigan, on the twenty-seventh day of August, 1981.

Present: John Feikens
Chief United States District Judge

These matters having come before the Court on motions to suppress evidence seized as the result of monitoring electronic tracking devices ("beepers"), the Court having held an evidentiary hearing on the motions, and the Court being otherwise fully advised in the premises,

IT IS ORDERED that the motions to suppress evidence in the above-entitled case be, and the same hereby are, DENIED.

/s/ _____
JOHN FEIKENS
Chief United States District Judge

Filed August 28, 1981

APPENDIX D

United States of America v. *Larry Wayne Cassity, et al.*, Criminal Action No. 7-80932.

Proceedings before United States District Court for the Eastern District of Michigan (Feikens, J.), July 18, 1978:

* * * * *

[61] THE COURT: I am inclined, Mr. Wishnow, to agree with Mr. Parker. Even if in this situation no search warrant had been obtained, I would find it difficult to follow your argument because, it seems to me that a beeper, unlike wiretap activity, is a sophisticated surveillance tool. And to say that in this day and age law enforcement officers may not use the best we have to detect crime would be foolish.

To say that they would have to use the more clumsy 24-hour visual technique rather than a more modern homing device, it seems to me would be to say that we were all bereaved of our common sense.

In this case they sought the procedure, the independent judgment of a judicial officer as to whether or not under these circumstances their beeper could be placed in this can to go where it was intended. I am not [62] sure that they had to do that, although one has to applaud from this standoint the act of law enforcement agents when they do this because of most of the time when they don't, that's when they get in trouble. I don't know whether they would have been in trouble in this case and I don't think so.

No, I can't even see this as a close case, Mr. Wishnow. I think this is a surveillance tool. I don't think we have any of the concerns here that you voiced.

So, I must deny your motion to suppress.

May I see counsel in chambers a moment before we start the trial. I want to go over some of the ground rules here.

(Hearing concluded.)

APPENDIX E

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 81-1565/1-1566; 81-1567

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

v.

LARRY WAYNE CASSITY (81-1565), BILY SWORD (81-1566), STEPHEN GORDON LENK (81-1567), DEFENDANTS-APPELLANTS

Before: MARTIN AND JONES, Circuit Judges; and BROWN, Senior Circuit Judge.

JUDGMENT

ON APPEAL from the United States District Court for the Eastern District of Michigan.

THIS CAUSE came on to be heard on the record from the said District Court and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this court that the judgment of the said District Court in this case be and the same is hereby reversed.

No costs taxed.

ENTERED BY ORDER OF THE COURT

John P. Hehman, Clerk

/s/ _____

JOHN P. HEHMAN,
Clerk

Attest:

/s/ _____

LINDA L. BRINSON
Deputy Clerk

Issued as Mandate: December 27, 1983

APPENDIX F

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Nos. 81-1565-6-7

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE,

v.

LARRY WAYNE CASSITY, (81-1565) BILLY SWORD, (81-1566) STEPHEN GORDON LENK, (81-1567)
DEFENDANT-APPELLANTS

ORDER

Upon consideration of the appellees' motion to hold the cause in abeyance pending a decision in a related United States Supreme Court case, and the response thereto;

It is ORDERED that the motion be and hereby is denied.

ENTERED BY ORDER OF THE COURT

/s/ _____

JOHN P. HEHMAN,
Clerk

Filed December 23, 1983

APPENDIX G

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Nos. 81-1565/6/7

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE,

vs.

LARRY WAYNE CASSITY, (81-1565) BILL SWORD, (81-1566) AND STEPHEN GORDON LENK, (81-1567) DEFENDANTS-APPELLANTS.

ORDER

Upon consideration of the apellee's motion for an order nunc pro tunc treating earlier motion to hold case in abeyance as a petition for rehearing;

It is ORDERED that the motion be and hereby is denied.

ENTERED BY ORDER OF THE COURT
JOHN P. HEHMAN, CLERK

/s/ _____

Filed January 25, 1984